in the Supreme Court of the United States

October Term, 1976

76-1647

CASE NO._____

RICHARD ALAN KATZMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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RICHARD ALAN KATZMAN,
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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Florida, entered on February 25, 1977, affirming the Appellant-Defendant's conviction, and submits this Statement to show that this appeal is within the jurisdiction of the Supreme Court of the United States, and that a substantial federal question is presented.

OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 343 So. 2d 38. A copy of the Opinion is attached to this Statement as Appendix A.

JURISDICTION

Appellant was convicted of a traffic infraction by the County Court in and for Dade County, Florida. Appellant was sentenced to pay a fine of thirty-five dollars ($35.00), plus six dollars ($6.00) court costs. The Appellant's objection to a fine exceeding twenty-five dollars ($25.00) was overruled, and the challenged statutes held constitutional. Upon appeal to the Supreme Court of Florida, the conviction and sentence were affirmed. *Katzman v. State,* 343 So.2d 38 (Fla. 1977). The Court based its decision upon *Levitz v. State,* 339 So. 2d 655 (Fla. 1976). This appeal followed from the decision in favor of the validity of Sections 316.026, 318.14, and 318.18, Florida Statutes, where the Supreme Court of Florida denied Appellant's challenge to these statutes being repugnant to the United States Constitution. This Court has jurisdiction of this appeal. 28 U.S.C.1257 (2);cf. *Gardner v. Florida,* U.S. , 97 S.Ct. 1197, 1206 (1977).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. Is the penalty procedure prescribed in Sections 316.026, 318.14, and 318.18, Florida Statutes, a violation of due process by penalizing the exercise of the constitutional right to a hearing, where an accused traffic law violator is subject to increased deprivation of property and restraint of liberty upon mere exercise of that constitutional right.

B. Does this penalty procedure deprive Appellant and all others who exercise their constitutional right to a hearing, of the equal protection of the laws?

STATUTES INVOLVED

Set forth in Appendix B are: Sections 316.026, 318.14, and 318.18, Florida Statutes.

STATEMENT

The Appellant was charged with unlawful speed under an incorrect statute, Section 316.101, Florida Statutes. The citation and judgment of conviction are set forth in Appendix C. Upon conviction, the County Court in and for Dade County, Florida sentenced Appellant to pay a fine of thirty-five dollars ($35.00) and six dollars ($6.00) court costs. Appellant objected to a fine exceeding twenty-five dollars ($25.00), and moved to declare Sections 316.026, 318.14, and 318.18, Florida Statutes, unconstitutional on the ground that the statutes violated the United States Constitution. The County Court overruled the objection, denied the motion, and held the statutes constitutional.

Appellant appealed his conviction and sentence to the

Circuit Court of the Eleventh Judicial Circuit of Florida. That Court found that the County Court passed directly upon the constitutional validity of the state statutes. The Circuit Court transferred the appeal to the Supreme Court of Florida, pursuant to Article V, Section 3 (b) (1), Florida Constitution, and Fla. App. Rule 2.1.a. (5) (a).

In the Supreme Court of Florida, Appellant questioned the validity of Sections 316.026, 318.14 and 318.18, Florida Statutes, on the grounds they were repugnant to the Eighth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The decision of the Supreme Court of Florida was in favor of the statutes' validity.

THE QUESTIONS ARE SUBSTANTIAL

A primary principle of constitutional law mandates the state government may not take its citizens' property, nor restrain their liberty without according them the due process of law. The foundation of "due process" is the right to a full and fair hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The right to a hearing may not be impeded, curtailed, nor eliminated.

Sections 316.026, 318.14, and 318.18, Florida Statutes, provide that a person cited for a traffic infraction may waive the constitutional right to a hearing. Upon this waiver, and a plea of no contest or guilty, the penalty of a twenty-five dollar ($25.00) fine is imposed. No other penalty may be exacted.

If a person cited for a traffic infraction exercises the constitutional right to a hearing, a penalty of a five hundred dollar ($500.00) fine and/or mandatory attendance at

driver improvement school may be imposed. The statutes provide no standards upon which the trial court is to base its sentence. The right of appellate review is granted by the statutes; however, no standards are provided upon which the appellate court is to review the severity of the sentence imposed.

This procedure, which penalizes the exercise of the constitutional right to a hearing, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Though perhaps administratively expedient, this degradation of the due process of law to a supermarket for the dispensation of justice is repugnant to the Constitution. The sale of guilty pleas at bargain prices is inconsistent with due process where the State has such a coercive and unfair hold over an accused who might otherwise seek the constitutional right to have the State put to its proof before taking an accused's property or restraining his liberty.

> [D]ue process requires at a minimum that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."
> *Boddie v. Connecticut*, 401 U.S. 371,377 (1971).

To condition the opportunity to be heard on the risk of a fine twenty (20) times in excess of that imposed on waiver of this constitutional right, and upon risk of a restraint of liberty not imposed on waiver, is to render the opportunity meaningless.

This Court has previously passed upon a statute which penalized the assertion of a constitutional right. In *United States v. Jackson,* 390 U.S. 570 (1968), a provision of the Federal Kidnapping Act, which permitted imposition of the death penalty only by exercise of the right to a jury trial, was invalidated. This Court said:

"Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die . . . The inevitable effect of any such provision, is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the government notes, limiting the death penalty to cases where the jury recommends its imposition, does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case . . .

The Government suggests that because the Act thus operates 'to mitigate the severity of punishment, it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' We cannot agree.

Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. United States v. Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L.Ed.2d 508; Shelton v. Tucker, 346 U.S. 479, 488-489, 81 S.Ct. 247, 252 ,5 L.Ed. 2d 231. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial . . . Whatever the power of Congress to impose penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See Griffin v. State of California, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed. 2d 106.

It is no answer to urge, as does the Government that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the

assertion of a constitutional right. Thus, the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. The power to reject coerced guilty pleas and involuntary jury waivers might alleviate but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal kidnapping Act. . ."
United States v. Jackson, supra, at 581-583.

Here, as in *Jackson, supra,* an accused who waives the right to contest guilt in a fair and impartial hearing is assured of a penalty not exceeding a twenty-five dollar ($25.00) fine. However, an accused who asserts innocence or for some other reason (such as inability to pay the twenty-five dollar ($25.00) fine) exercises the constitutional right to a hearing, may be subjected to a five hundred dollar ($500.00) fine and a restraint on liberty, mandatory attendance at driver improvement school. The inevitable effect of this statutory scheme is to discourage assertion of the Fourteenth Amendment right to a hearing. Whatever the benefits of this mail order system of justice, such permissible objectives as improvement of the administration of justice cannot be pursued by means that needlessly chill the exercise of the basic constitutional right to a hearing. The same goal can be achieved without penalizing defendants who plead not guilty or who otherwise need an opportunity to be heard. Where the exercise of this basic constitutional right is penalized, the State must use the least drastic alternative, as a mandate of due process. *Dale v. Hahn,* 311 F. Supp. 1293 (D.C. N.Y.

1970). Instead, the State of Florida has chosen a blunderbuss method for administering its traffic laws. See *Shapiro v. Thompson,* 394 U.S. 618,637 (1969).

"It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Frost and Frost Trucking Co. v. Railroad Commission of California, 271 U.S. 583 (1926.) 'Constitutional rights would be of little value if they could be . . . indirectly denied,' Smith v. Allright, 321 U.S. 649, 664 (1944), or 'manipulated out of existence.' Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960).
Harman v. Forssenious, 380 U.S. 528, 540 (1965).

An accused may not be coerced into waiving the constitutional right to a hearing. In *Garrity v. New Jersey,* 385 U.S. 493 (1967), this Court held that a confession exacted under a statute forcing a waiver of the constitutional right to remain silent or requiring forfeiture of a police officer's job, was coerced and therefore inadmissible in a state criminal prosecution. The Court said:

"We adhere to Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524,29 L. Ed. 746, a civil forfeiture action against property. A statute offered the owner an election between producing a document or forfeiture of the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. Id., at 634-635, 6 S.Ct."
Garrity, supra, at 495,496.

The petitioners in *Garrity, supra,* had a choice of job forfeiture or self-incrimination. In this case, Appellant had a choice of pleading guilty and waiving his right to a hearing or risking a restraint of liberty and five hundred dollar ($500.00) fine. This scheme, as the Court held the statutory scheme in *Garrity, supra,* is " 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' " *Garrity, supra,* at 497, quoting *Miranda v. Arizona,* 384 U.S. 436, 464-465 (1966). The State of Florida thus coerces accused traffic law violators to plead guilty. The waiver of the constitutional right to a hearing is exacted under duress.

> " 'Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it and then to declare the acceptance voluntary . . .' [*Union Pac. R.R. Co. v. Public Service Comm*]. 248 U.S. [67] at 70, 39 S.Ct. [24] at 25 [(1918)] .
>
> Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other. 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' Ibid."
>
> *Garrity, supra,* at 498.

As the court found in *Union Pac. R.R. Co. v. Public Service Comm., supra,* the State of Florida has imposed an unconstitutional burden on accused traffic law violators by

the threat of penalties far worse than in case of a failure to accept the discount guilty plea. Then, the State contends this statutory scheme provides merely voluntary guilty pleas and voluntary waivers of constitutional rights. The right to a hearing in this case, is a right " . . . of constitutional stature whose exercise a state may not condition by the exaction of a price." *Garrity, supra,* at 500.

> "No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty-that if he persists in the assertion of his right and is found guilty, he faces, in view of the trial court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law."
>
> *United States v. Tateo,* 214 F. Supp. 560 (D.C.N.Y. 1963).

The principle announced in *Tateo, supra,* applies to these quasi-criminal proceedings. The right to a fair hearing

> " . . . is one of the 'rudiments of fair play' (citation omitted) assured to every *litigant* by the Fourteenth Amendment as a minimal requirement (citation omitted). There can be no compromise on the footing of convenience or expedience or because of a natural desire to be rid of harrassing delay when that minimal requirement has been neglected or ignored."

Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292, 304, 305 (1937) (Cardozo, J., holding unburdened right to a fair hearing is required in administrative proceedings.)

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court held twelve (12) month residency within the State and three (3) month residency within the county requirements to register to vote, unreasonably burdened the constitutional right to travel. Much more directly does the risk of a restraint on liberty and a twenty-fold increase in fine dampen and unreasonably burden the constitutional right to a hearing, under the statutory scheme here in issue.

This Court has consistently rejected attempts to penalize or burden the exercise of a constitutional right. So much more repulsive to the constitutional mandate of due process is the scheme in use by Florida, where access to the courtroom with the opportunity for a fair hearing is conditioned upon the wealth of the accused. The State may not force the accused to run the guantlet of risk of a five hundred dollar ($500.00) fine and/or restraint of liberty by mandatory attendance at driver improvement school in order for the accused to receive the due process of law before the State takes property and liberty.

Sections 316.026, 318.14, and 318.18, Florida Statutes, establish two classes of person charged with traffic infractions. Those who waive their right to a hearing are treated differently than those who assert their right to a hearing. This situation is closely analogous to the statutes struck down by this Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969).

There is no question that the effect of these statutes is to create two classes of accused traffic law violators

indistinguishable from each other except that one class is composed of those who waive their right to a hearing, and the second is composed of accused violators who exercise their constitutional right to a hearing. On the basis of this sole difference of asserting a constitutional right, the first class is given a maximum sentence of a twenty-five dollar ($25.00) fine, while the second class is subjected to fines up to five hundred dollars ($500.00) and mandatory attendance at driver improvement school. See *Shapiro, supra*, at 627. No standards govern imposition of the increased punishment. A member of the first class could be cited for a traffic infraction twenty times on twenty consecutive days. As a member of the class waiving their constitutional right to a hearing, that accused violator could be subject to a fine not exceeding twenty-five dollars ($25.00) on each of the twenty violations. On the other hand, a member of the second class who is cited for one infraction and who has never previously been convicted of violating any traffic law, may be sentenced to pay a fine of, for example, one hundred dollars ($100.00), and mandatory attendance at driver improvement school. The harsher punishment is inflicted solely on the basis of exercise of the constitutional right to a hearing by the member of the second class.

This statutory scheme creates a classification which constitutes an invidious discrimination denying accused traffic law violators the equal protection of the laws. See *Shapiro, supra*, at 627.

Just as the residency requirement unreasonably burdened free exercise of the right to travel, in *Shapiro, supra,;* so, too, does the penalty inflicted by Florida on those accused traffic law violators unreasonably burden free exercise of the constitutional right to a hearing.

Moreover, the State's interests in establishing this penalty procedure are either impermissible or do not constitute compelling governmental interests.

Reduction of court calendars and promotion of guilty pleas in those cases without defense may be valid State interests. These interests may not, however, be promoted by a blunderbuss method that is blind to those seeking to assert a constitutional right. Just as inhibiting migration was found to be an impermissible State objective in *Shapiro, supra,* promotion of guilty pleas and waivers of the right to a hearing with concurrent deterrence of exercise of constitutional rights is an impermissible State objective, particularly where, as here, less drastic alternatives are available.

> "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconsitutional.' United States v. Jackson 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed 2d 138 (1968)."
> *Shapiro, supra,* at 631.

The three statutes in this case have not been tailored to meet the permissible state objectives involved. In fact, as the previously-given example illustrates, those most deserving of punishment can easily avoid penalties designed to deter violations of traffic laws and improve poor drivers, by merely waiving their constitutional right to a hearing,

In actual operation, therefore, these three statutes enact what, in effect, are nonrebuttable presumptions that accused traffic law violators who waive their constitutional right to a hearing, are less deserving of punishment than those who assert that constitutional right. See *Shapiro, supra,* at 631, 632. There is no rational relationship between

the State's objectives in improving judicial administration and penalizing those who assert their constitutional rights. See *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61,78 (1911); *Flemming v. Nestor,* 363 U.S. 603, 611 (1960); *McGowan v. Maryland,* 366 U.S. 420, 426 (1961).

The Appellant was exercising his constitutional rights to a hearing and access to courts, *Boddie v. Connecticut,* 401 U.S. 371 (1971),

> " . . . and any classification which serves to penalize the exercise of that right unless shown to be necessary to promote a compelling governmental interest, is unconstitutional. Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942); Korematsu v. United States, 323 U.S. 214, 216, 65 S.Ct. 193, 194, 98 L.Ed. 194 (1944); Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 417, 4 L.Ed. 2d 480 (1960); Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963)."
> *Shapiro, supra, at 634.*

Thus, these statutes create a classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

There is no rational basis for Florida's traffic violation [illegible]. Even less are these laws tailored to necessitate [illegible] to achieve compelling governmental interests. Less [illegible] alternatives are available as opposed to this method of guaranteeing avoidance of harsh penalties to those who waive their constitutional rights, but subjecting those who assert their constitutional right, to harsh penalties without standards for imposition. This classification violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Shapiro, supra,* at 644 (Stewart, J. concurring.)

The lack of standards for imposing increased fines and restraint of liberty violates the Eighth and Fourteenth Amendments to the United States Constitution. To permit any increase in penalty solely because the accused asserted a constitutional right violates the guarantees of due process and equal protection of the laws. See *Sawyer v. Sigler*, 320 F. Supp. 690 (D. C. Neb. 1970); *Berger v. City and County of Denver*, 350 P. 2d 192 (Col. 1960); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

Respectfully submitted,

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Attorneys for Appellant

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North Miami Beach, Fla. 33162

PROOF OF SERVICE

I, RICHARD YALE FEDER, one of the attorneys for appellant and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of May, 1977, I served a copy of the foregoing Jurisdictional Statement on:

ROBERT L. SHEVIN, Attorney General
THOMAS A. BEENCK, Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida,

by mailing a true and correct copy, in a duly addressed envelope, with postage prepaid, to these named attorneys of record for appellee.

RICHARD YALE FEDER, Esquire
19 West Flagler Street
Miami, Florida 33130

Richard Alan KATZMAN, Appellant,

v.

STATE of Florida, Appellee.

No. 49599
Supreme Court of Florida
February 25, 1977

Appeal from County Court, Dade County, James Rainwater, Judge.

Maurice Rosen, North Miami Beach, for appellant.

Robert L. Shevin. Atty. Gen., and Thomas A. Beenck, Asst. Atty. Gen., for appellee.

BY THE COURT.
Affirmed. *Levitz v. State,* 339 So.2d. 655 (Fla. 1976).

OVERTON, C. J., and ADKINS, BOYD, ENGLAND, HATCHETT and KARL, JJ., concur.

SUNDBERG, J., dissents.

316.026
PENALTIES

(1) A violation of any of the provisions of this chapter, except criminal offenses enumerated in subsection (4), shall be deemed an infraction, as defined in §318.13(3).

(2) Infractions of this chapter which do not result in a hearing shall be subject to the civil penalties provided in §318.18.

(3) Infractions of this chapter which do result in a hearing shall be subject to a civil penalty not to exceed five hundred dollars. For an infraction resulting in a hearing, a person may be required to attend a driver improvement school in lieu of, or in addition to, the civil penalty imposed.

(4) Any person convicted of a violation of §316.019, §316.027, §316.028, §316.029, §316.061, (or) §316.067 shall be punished as specifically provided in such sections.

318.14 NONCRIMINAL TRAFFIC INFRACTIONS; EXCEPTION; PROCEDURES

(1) Except as provided in §318.17, any person cited for a violation of chapter 316, chapter 325, part II, or §339.30 §340.23 or §239.55 shall be deemed to be charged with a noncriminal infraction and shall be cited for such an infraction and cited to appear before an official.

(2) Any person cited for an infraction under this section may:

(a) Post a bond, which shall be equal in amount to the applicable civil penalty established in § 318.18; or

(b) Sign and accept a citation indicating a promise to appear. The officer may indicate on the traffic citation the time and location of the scheduled hearing and shall indicate the applicable civil penalty established in §318.18.

(3) Any person who willfully refuses to post a bond or accept and sign a summons shall be guilty of a misdemeanor of the second degree.

(4) Any person charged with noncriminal infraction under this section may:

(a) Pay the civil penalty, either by mail or in person, within 10 days of the date of receiving the citation; or,

(b) If he has posted bond, forfeit bond by not appearing at the designated time and location.

If the person cited follows either of the above procedures, he shall be deemed to have admitted the infraction and to have waived his right to a hearing on the issue of commission of the infraction. Such admission shall not be used as evidence in any other proceedings.

(5) Any person electing to appear before the designated official or who is required so to appear shall be deemed to have waived his right to the civil penalty provisions of §318.18. The official, after a hearing, shall make a determination as to whether an infraction has been committed. If the commission of an infraction has been proven, the official may impose a civil penalty not to exceed $500 or require attendance at a driver improvement school, or both.

(6) The commission of a charged infraction at a hearing under the chapter must be proved beyond a reasonable doubt.

(7) The official having jurisdiction over the infraction shall certify to the department within 10 days after payment of the civil penalty or forfeiture of bond that the defendant has admitted to the infraction. If the charge results in a hearing, the official having jurisdiction shall certify to the department the final disposition within 10 days of the hearing.

(8) When a report of a determination or admission of an infraction is received by the department, it shall proceed to enter the proper number of points on the licensee's driving record in accordance with §322.27.

318.18 AMOUNT OF CIVIL PENALTIES

The penalties required for a noncriminal disposition pursuant to §318.14 (1), (2), and (4) shall be as follows:

(1) Five dollars for all infractions of bicycle regulations under §316.11 and infractions of pedestrian regulations under §316.057.

(2) Fifteen dollars for all nonmoving traffic violations.

(3) Twenty-five dollars for all moving violations not requiring a mandatory appearance.

(4) The penalty imposed under §316.200 shall be determined by the officer in accordance with the provisions of §316.199 and §316.200.

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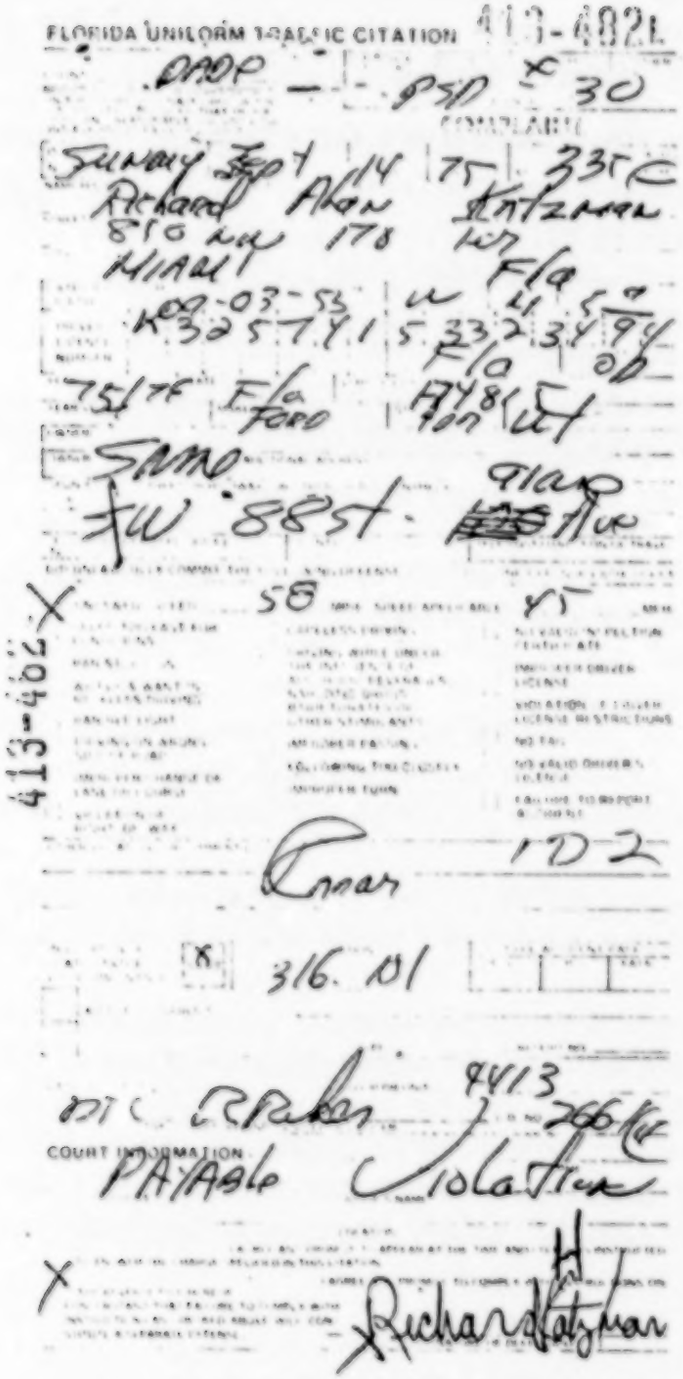
Appendix C.


FLORIDA UNIFORM TRAFFIC CITATION 413-482L

COMPLAINT

413-482L

COURT INFORMATION

App. 6

CASE No. _____ TRIAL DOCKET No. _____ PAGE No. _____

Date	COURT ACTION AND OTHER ORDERS
	BOND ESTREATED _____ Judge
	Continuance to _____ Reason _____
	Continuance to _____ Reason _____
	Warrant issued _____
	Warrant served _____
	Adjudication withheld _____

ARRAIGNMENT, JUDGMENT, SENTENCE, AND ORDER

Said Defendant appeared for trial/hearing on this _____ day

MAR 23 1976

_____, A.D. 19__, and entered a plea of _____ to the charge as set forth herein.

After hearing the evidence and duly considering the same, the Court/Jury finds you, the Defendant, _____ guilty of said charge.

AND IT IS ORDERED AND ADJUDGED that you, the Defendant, are _____ guilty as charged, of said offense as set forth herein.

IT IS THEREFORE the Judgment, Order, and Sentence of the Court that you, the Defendant, be imprisoned in the County Day Jail for a term of _____ days and pay a fine of $ 35.00 and the costs herein, and in default of such payment, that you, the Defendant, stand committed to the County Jail of _____ City Jail at _____ for a term of _____ days.

DONE, ORDERED, AND ADJUDGED in open Court at

MAR 23 1976 CUTLER RIDGE

Florida, this _____ day of _____, A.D. 19__.

Judge

Traffic School _____

Probation _____ JUDGE RAINWATER

Defendant Notified of His Rights _____

Driver's License { Length of Suspension _____ Length of Revocation _____ or, check one: Maximum _____ Minimum _____

Testimony - Judge's Notes (or other Court Orders)

NO ACTION
1-20-76
Judge Faulkner

Appeal Bond of $ _____ Filed for _____

Appealed to _____ Cir.

Stay - 4-23-76

In the

SUPREME COURT

of the

UNITED STATES

October Term, 1976

76-1647

CASE NO. _____

RICHARD ALAN KATZMAN,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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In the

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ON APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATUTES

This appeal raises the question of the validity of Sections 316.026, 318.14, and 318.18, Florida Statutes.

Section 316.026 is the penalty provision of Chapter 316, the state Uniform Traffic Control Act. This statute provides that infractions of that chapter which do not result in a hearing shall be subject to the civil penalties provided in Section 318.18, Florida Statutes, and infractions which do result in a hearing shall be subject to a civil penalty not to exceed five hundred dollars ($500.00) and/or attendance at a driver improvement school. Section 318.18(3) provides the penalty of twenty-five dollars ($25.00) for all moving violations not requiring a mandatory appearance. Section 318.14(5) provides any person who elects to appear

before a hearing official (any state or municipal judge authorized to preside over a court or hearing adjudicating traffic infractions), shall be deemed to have waived his right to the civil provisions of Section 318.18, and further provides should the hearing official find the infraction had been proved, he may impose a civil penalty not to exceed five hundred dollars ($500.00) and/or require attendance at a driver improvement school.

B. THE PROCEEDINGS BELOW

The Appellant was charged with unlawful speed under Section 316, Florida Statutes (1971). He elected to have a hearing, although none was required under Section 318, Florida Statutes (1974), it being a payable offense. Hearing was set for March 23, 1976, a not guilty plea was entered, and the Appellant found otherwise following the hearing. The Appellant was ordered to pay a thirty-five dollar ($35.00) fine and court costs of six dollars ($6.00). According to the Appellant, he objected to the fine being in excess of twenty-five dollars ($25.00), alleging the statute allowing a larger penalty if a hearing was requested and held in a non-mandatory hearing infraction, was a violation of constitutional due process of law. The hearing official denied the motion on the constitutional question.

The Appellant took an appeal to the Circuit Court in and for Dade County, which Court granted a motion to transfer the case to the Supreme Court of Florida

as a ruling on the constitutionality of a state statute was directly decided by the hearing official.

Appellant's conviction and sentence were affirmed by the Florida Supreme Court, Katzman v. State, 343 So.2d 38 (Fla. 1977), based upon Levitz v. State, 339 So.2d 655 (Fla. 1976). This appeal followed, asserting 28 U.S.C. §1257(2) as the basis for this Court's jurisdiction. On April 18, 1977, Appellant Katzman moved the Florida Supreme Court for a certificate that the following federal questions were passed upon in adjudicating that appeal:

1. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as these statutes have been applied in this case? Appellant's Brief, at Page 6.

2. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as these statutes have been applied to this case? Appellant's Brief, at Page 13.

3. Whether the traffic statutes, Fla. Stat., Secs. 316.026, 318.14, and 318.18 violate the Eighth and Fourteenth Amendments to the United States Constitution, as these statutes have been applied in this case? Appellant's Brief, at Pages 19 and 22.

On May 9, 1977, Appellant's Motion for Certificate was denied by the Florida Supreme Court.

II.

ARGUMENT

The Appellee agrees with Appellant's statement that state government may not take its citizens' property, nor restrain their liberty without according them the due process of law. From this hornbook principle, and a correlative axiom concerning the right to a full and fair hearing being the foundation of due process, the Appellant somehow leaps to the unwarranted conclusion that the mere possibility of receiving a larger and mandatory attendance at a driver improvement school following a hearing on a traffic infraction denies basic constitutional due process.

This Court's decision in United States v. Jackson, 390 U.S. 570 (1968) is heavily relied upon by the Appellant to illustrate the discouragement of the exercise of the constitutional right not to plead guilty, and the deterring of the Sixth Amendment right to demand a jury trial. However, a review of this Court's decisions following Jackson, supra, reveals a distinctly different analysis from that made by the Appellant. In Brady v. United States, 397 U.S. 742 (1970), this Court stated that the decision in United States v. Jackson, supra, did not require that every guilty plea entered under the statute be invalidated, even when the fear of death was shown to have been a

factor in the plea; and that a plea of guilty was not invalid merely because it was entered to avoid the possibility of a death penalty. The decision faced by the defendant in Brady, supra, is closely analagous to the decision facing Appellant Katzman - whether to face the possibility of a heavier penalty should a guilty verdict be returned against him. Speaking to this question, this Court stated, at p. 750:

> Brady's claim is ... that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof.
> Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty

> than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty. We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

The alternatives facing Appellant Katzman are another example where a plea of guilty could have been made to avoid the possibility of receiving a greater penalty should the state prove his guilt.

In North Carolina v. Alford, 400 U.S. 25 (1970), the defendant plead guilty to second degree murder, although he proclaimed his innocence of the charge, to

avoid a possible death penalty upon a jury conviction of first degree murder. In discussing the effect of a guilty plea, the Court stated at p. 400:

> Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

In Colten v. Kentucky, 407 U.S. 104 (1972), the appellant was tried in an inferior court, found guilty, and fined $10.00. Under Kentucky law, if he wished to contest the verdict, the next step was by a trial de novo in a court of general criminal jurisdiction. Colten opted for that trial, was found guilty again, and fined this time $50.00. He

appealed this judgment, contending that the possibility of a heavier fine discouraged the exercise of the right to appeal. This Court in setting out justifications for this two-tier system stated at p. 114:

> ... first, in this day of increasing burdens on state judiciaries,these courts are designed, in the interest of both the defendant and the state, to provide speedier and less costly adjudications than may be possible in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available; second, if the defendant is not satisfied with the results of his first trial he has the unconditional right to a new trial in a superior court, unprejudiced by the proceedings or the outcome in the inferior courts.

The situation is similar here,except instead of a first hearing in the lower court, a person issued a citation for an infraction has the option of pleading guilty, in effect, and paying the fine. This Court in upholding Kentucky's system, stated that it did not penalize someone for taking an appeal, and that the party would be afforded full due process with a fresh determination of guilt or innocence. In language which is applicable to this case, Justice White said at p. 119:

> In reality his choices are to accept the decision of the judge

> and the sentence imposed in the inferior court or to reject what in effect is no more an offer in settlement of his case and seek the judgment of judge or jury in the superior court, with sentence to be determined by the full record made in that court. We cannot say that the Kentucky trial de novo system, as such, is unconstitutional.

Finally, this Court's recent decision in Middendorf v. Henry, 425 U.S. 25 (1976) helps lay appellant's argument to rest. In Middendorf, supra, members of the United States Marine Corps brought a class action challenging the authority of the military to try them at summary courts-martial without providing them counsel. The Marines had the choice of facing the summary courts-martial without counsel or to proceed to trial by special or general court-martial, at which they may have counsel, but which would expose them to greater possible penalties. The Court held that the detriment of greater possible penalties faced at a general or special court martial was not constitutionally decisive. It was stated at p. 47:

> We have frequently approved the much more difficult decision, daily faced by civilian criminal defendants, to plead guilty to a lesser included offense. E.g., Brady v. United States, 397 U.S. 742, 749-750, 25 L.Ed.2d 747,90 S.Ct.

> 1463 (1970). In such a case the defendant gives up not only his right to counsel but his right to any trial at all. Furthermore, if he elects to exercise his right to trial he stands to be convicted of a more serious offense which will likely bear increased penalties.
> Such choices are a necessary part of the criminal justice system:
>
> > The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. McMann v. Richardson, 397 U.S., at 769, 25 L.Ed.2d 763, 90 S.Ct. 1441. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.
>
> McGautha v. California, 402 U.S. 183,213, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971).

It is readily apparent that the statutory scheme for the judicial disposition of traffic infractions challenged here by the appellant, in no way violates due process by subjecting a defendant to the possibility of a higher penalty should he plead not guilty and request a hearing. The Constitution mandates that due process

be afforded, whether the defendant chooses to plead guilty or to demand a hearing. However, the Constitution does not forbid requiring him to choose.

Appellant Katzman also challenges Sections 316.026,318.14 and 318.18, Florida Statutes, on the ground that the overall effect of the statutes is to create two classes of traffic offenders which are treated differently in violation of the Equal Protection Clause of the Fourteenth Amendment. It is the appellant's contention that the two classes of traffic offenders, those who pay the twenty-five dollars ($25.00) fine in advance of a court hearing and those who opt for a hearing, are treated differently because although they may have committed the same infraction, the second class subjects itself to a greater penalty than the first class. In Schnieder v. California, 427 F.2d 1178 (9th Cir. 1970) the appellant alleged that the state statute under which he had been prosecuted violated the Equal Protection Clause by permitting "... different punishment for the same acts, committed under the same circumstances, by persons in like situations." Addressing itself to this contention the court stated at p. 1179:

> Nothing in the constitution requires that persons convicted of the same crime receive identical penalties.
>
> All murderers do not die, nor is every speeder arrested, or if fined,

> fined a similar amount. Disparity of sentences is the subject of much discussion these days but no one has suggested that the discretion of the trial judge as to the sentences to be given in all cases should be eliminated.

Marcella v. United States, 285 F.2d 322 at 324 (9th Cir. 1960) cert. den. 366 U.S. 911 (1961). (Other citations ommitted.)

The analogous situation of plea bargaining discussed in Brady v. United States, supra, also helps defeat appellant's argument of a denial of equal protection rights. Surely it can not be argued that the defendant who pleads guilty and receives a lesser sentence is somehow in a class of persons different from the defendant who goes to trial, is convicted, and receives a heavier sentence. In both instances, each class of persons receive all the due process rights to which they are entitled. It is undisputed that if a defendant chooses to contest the traffic citation, the hearing he is granted comports with due process requirements.

It seems that appellant's argument can be restated that he is generally upset with the trial judge's discretion in levying a penalty following the adjudication of his guilt of the speeding infraction. This discretion is one, however, which is well settled, and not

subject to be set aside in this case. There is nothing in the record to reflect that the hearing officer abused his discretion by fining the appellant thirty-five dollars ($35.00) plus six dollars ($6.00) court costs.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment in the cause by the Supreme Court of Florida.

Respectfully submitted,

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PROOF OF SERVICE

I, WILLIAM C. SHERRILL, JR., one of the Attorneys for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June, 1977, I served a copy of the foregoing Motion to Dismiss or Affirm on:

MAURICE ROSEN, ESQUIRE
RICHARD YALE FEDER, ESQUIRE
American Civil Liberties Union
Foundation of Florida, Inc.
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by mailing a true and correct copy, in a duly addressed envelope, with postage pre-paid, to these named attorneys of record for Appellant.

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